IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 543

IRVING M. RUBENSTEIN, a/k/a IRVING M. RUBY,
Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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IRVING M. RUBENSTEIN, a/k/a IRVING M. RUBY,
PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Irving M. Rubenstein, also known as Irving M. Ruby, respectfully prays that a writ of certiorari be issued to review an opinion and judgment of the United States Court of Appeals for the Tenth Circuit insofar as it ordered "the cause remanded to the District Court with directions to hold a hearing to determine whether the incidents of which complaint is made did affect or reasonably tended to affect the full and free exercise of the calm and informed judgment of any member or members of the jury and if it is found that such incidents actually had or reasonably tended to have such effect, to grant a new trial."

OPINIONS BELOW

The opinion of the Court of Appeals (R. 3) is unreported as yet. There was no written opinion by the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered September 1, 1955. (R. 13) The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. Section 2255 and under 28 U. S. C., Sec. 1254 (1).

QUESTION PRESENTED

1. Has a defendant in a criminal cause been accorded a trial before "a fair and impartial jury", where a few days before the commencement of the trial, the entire jury panel (from which the trial jury was selected) had been questioned by the Grand Jury (Supp. Tr. 3) and many had been questioned by Treasury Agents (Supp. Tr. 3) and each was asked whether he had been approached by anyone with reference to his activities as a juror, whether he had received any threats or promises, and whether he had received any information on the subject, (Supp. Tr. 4) which facts were unknown to defendant's counsel but were well known to the trial judge and to the District Attorney.

CONSTITUTIONAL AMENDMENT INVOLVED

Article VI of the Amendments to the Constitution provides,

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be con-

fronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT

Petitioner was charged in a two count indictment with violation of Section 145 (b) of the Internal Revenue Code in willfully understating his income for the year 1946 and violating Section 3793 (b) (1) by aiding, procuring and advising the preparation of a fraudulent return by his wife. (R. 2-3)

Trial was commenced on the 29th day of September, 1953 and resulted in a conviction (October 2, 1953) on both counts. Appeal to the Court of Appeals (10th Cir.) resulted in affirmance on the first count and reversal of the second count. Rubenstein vs. United States, 214 F. 2d 667, certiorari denied 348 U. S. 896. (December 6, 1954)

On January 20, 1955, Honorable Willis W. Ritter, District Judge for the District of Utah, who presided at the trial in Denver, in the District of Colorado, reduced the sentence from three to two years conditioned upon payment of the $10,000.00 fine imposed. The fine was paid and petitioner surrendered to the Marshal on January 30, 1955 and has been in custody ever since.

On February 8, 1955, petitioner filed a motion to vacate and set aside the judgment pursuant to Title 28 U. S. C. 2255 in which it was alleged upon information and belief that prior to the commencement of the trial the members of the jury panel from which the trial jury was selected had been questioned by United States Treasury Agents and by the Grand Jury as to whether they had been approached by anyone with reference to their jury service which facts were unknown to the then counsel for

petitioner but that such facts were well known to the then United States District Attorney and to the trial judge (Hon. Willis W. Ritter).

The motion was summarily denied on February 21, 1955 by Judge Ritter without according petitioner a hearing and consequently without making any findings. The trial judge in no way refuted the allegation that the fact of the questioning was well known to him.

Appeal was had to the Court of Appeals (10th Cir.). On May 24, 1955 a stipulation was filed in the District Court (Supp. Tr.) admitting the questioning of the entire panel by the Grand Jury and by United States Treasury Agents prior to the commencement of the trial. This stipulation was transmitted to the Court of Appeals on May 25, 1955 the date of the oral argument (Supp. Tr. 1).

In the Transcript of Record the voir dire examination discloses that the trial court asked the jurors if they knew of any reason why they could not be fair and impartial, however, no reference of any kind was made to the very recent questioning of the members of the jury by the Grand Jury or by United States Treasury Agents, which was unknown to petitioner's counsel.

In the brief filed in the Court of Appeals on behalf of the Government the following appears on pages 3 and 4.

> "On June 2, 1953, a criminal tax case against one Eugene Smaldone came on for trial in the District Court for the District of Colorado. On June 3, 1953, his trial was continued until June 10, 1953, because of his illness. After resumption of the trial, a mistrial was declared on June 12, 1953, and the case was again set for trial on September 21, 1953. In the meantime, a grand jury undertook an investigation of jury tampering in connection with the prior and

pending Smaldone tax case. As a result of this investigation, indictments were returned on September 21, September 25, September 28, and October 16, 1953, charging Eugene Smaldone, Clyde Smaldone and others with conspiracy and the substantive offenses of attempted bribery and obstruction of justice in approaching members of the petit jury panel. The facts as to these charges, as developed at the later trial of the indictments commencing on October 29, 1953, are more fully reflected in the opinion of this Court in Calvaresi et al. v. United States, 216 F. 2d 891, reversed on other grounds, 348 U. S. 961.

On or about September 23 and 24, 1953, members of the jury panel from which the jury selected to try the instant case was subsequently drawn, were questioned by agents of the Internal Revenue Service as to whether they had been approached concerning their jury service. Nine of the jurors who tried this case were so questioned before the trial. One of these, Mr. G. Vane Golden, was questioned on September 23, 1953, as to whether anyone had contacted or talked to him regarding his jury service or recently offered him an unusually attractive financial deal, to which questions he replied in the negative. The remaining eight were questioned as to whether anyone had contacted or talked to them regarding their jury service. All replied in the negative (see stipulation of the parties)."

REASONS FOR GRANTING THE WRIT

At first blush it may appear that we are asking this Court to grant our petition for a Writ of Certiorari after having been victorious in the Court of Appeals.

However, an analysis of the facts and the opinion of

the Court of Appeals discloses that the cause was ordered remanded to the District Court with directions to hold a hearing to determine whether any juror was affected in his service as a juror in this cause by reason of having been previously questioned by the Grand Jury and by United States Treasury Agents.

In the event of such a hearing the burden will be on the petitioner to establish the prejudice that might have resulted from the influences to which the jurors were subjected.

An extensive search of the authorities and digests has failed to disclose a situation identical to the instant facts.

However, this Court, as have all appellate courts to which the question has been presented, has condemned any improper influences brought to bear upon any juror.

The question here might be posed as to whether or not the Government is in any better position than the individual defendant and whether the Government acting through its agents may subject the individual jurors to Grand Jury questioning, to Treasury Agents' questioning and when called to account fall back on the old cliche that the defendant must show prejudice.

That is the position of the Government here and the rule adopted by the Court of Appeals. It is our contention that when the facts were admitted by the Government in the Stipulation (Supp. Tr. 3-4) and in their brief filed just prior to oral argument, as well as in the oral argument, prejudice was established as a matter of law or at the least the burden should have been placed upon the Government to show lack of prejudice to the defendant.

An attitude similar to that of the Government was

adopted by the defendant in *Sinclair vs. United States*, 279 United States 749, where it was developed that the individual jurors have been placed under surveillance on orders of the defendant.

The contention was made that there was no evidence that any operative actually approached or communicated with a juror or attempted to do so or that any juror was conscious of observation.

This contention was rejected by this Court and we find in the opinion, (p. 764):

> "That the acts here disclosed, and for which three of the appellants were certainly responsible, tended to obstruct the honest and fair administration of justice we cannot doubt. The jury is an essential instrumentality—an appendage—of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law. The most exemplary resent having their foot-steps dogged by private detectives. All know that men who accept such employment commonly lack fine scruples, often wilfully misrepresent innocent conduct and manufacture charges. The mere suspicion that he, his family, and friends are being subjected to surveillance by such persons is enough to destroy the equilibrium of the average juror and render impossible the exercise of calm judgment upon patient consideration. If those fit for juries understand that they may be freely subjected to treatment like that here disclosed, they will either shun the burdens of the service or perform it with disquiet and disgust. Trial by capable juries, in important cases, probably would become an impossibility. The mistrial of November 2d indicates what would often happen. We can discover no reason for emascu-

lating the power of courts to protect themselves against this odious thing. See United States v. Shipp, 203 U. S. 563, 575, 51 L. ed. 319, 324, 27 Sup. Ct. Rep. 165, 8 Ann. Cas. 265."

The facts in the instant cause are even stronger in favor of our position. Here the questioning of the panel by the Grand Jury began on September 23 and continued through September 25th. Indictments for jury tampering were returned by the Grand Jury on September 21, 25 and 28. (Supp. Tr. 2) Immediately following the last date mentioned, namely on September 29, trial of petitioner began.

Typical of the questions to the jurors were those to Mary Forkner. (Supp. Tr. 9)

"Q. You are presently serving on the jury panel, are you?
A. Yes, sir, I am.
Q. Before you were called on the panel or during the time that you have been serving on the panel has anyone contacted you with reference to your service as a juror?
A. No, they haven't.
Q. Has anyone made any threats or promises or offers to you with reference to your jury service?
A. No.
Q. Has anyone discussed with you any of the cases that might be tried before this jury?
A. No."

In *Remmer vs. United States*, 347 United States 227, it appeared that during the course of the trial an unnamed person had communicated with a juror and remarked that he could profit by a verdict favorable to defendant.

The incident was reported to the Court who informed the prosecuting attorney. An investigation by the F. B. I. disclosed the statement apparently was made in jest. Defendant first learned of the incident after verdict.

A motion for a new trial was filed alleging these facts and alleging substantial prejudice coupled with a request for a hearing to determine the circumstances surrounding the incidents and its effect. The motion was denied without holding the requested hearing.

This Court said on page 229 of 347 U. S.:

"*In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial,* if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. *The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.* Mattox v. United States, 146 U.S. 140, 148-150, 36 L. ed. 917, 920, 921, 13 S. Ct. 50; Wheaton v. United States (C.A. 8th S.D.) 133 F. 2d 522, 527. We do not know from this record, nor does the petitioner know, what actually transpired, or whether the incidents that may have occurred were harmful or harmless. The sending of an F. B. I. agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror and is vary apt to do so unduly. A juror must feel free to exercise his functions without the F. B. I. or anyone else looking over his shoulder. The integrity of jury proceedings must not be jeopardized by unauthorized invasions.

> The trial court should not decide and take final action ex parte on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." (Emphasis Added)

In the instant cause the situation is fraught with even more serious consequences. The entire petit jury panel is questioned individually by the Grand Jury.

As heretofore set out typical questions were "Has anyone contacted you with reference to your service as a juror?" and "Has anyone made any threats or offers to you with reference to your jury service?" and also "Has anyone discussed with you any of the cases that might be tried before the jury?"

In the Remmer case, supra, the communication with the juror was by an unauthorized interloper while in the instant cause the questions were propounded to the jurors individually before a United States Grand Jury by a United States District Attorney and that immediately before (September 21) during (September 25) and immediately after (September 28) the questioning, indictments for jury tampering were returned by this same Grand Jury. And the next day (September 29) trial of the petitioner herein commenced before the jury panel.

It must also be remembered that as far as we can know each juror could have believed he alone was the target of the questioning. It must also not be forgotten that the jurors were also questioned by United States Treasury Agents before commencement of the trial of petitioner herein. The extent and purport of these questions are unknown to us.

In our brief before the Court of Appeals we quoted

from testimony of a hearing before a sub-committee of the Senate Judiciary Committee of the United States Senate held in Denver on December 12, 1953.

There, Honorable Warren Olney, III, Assistant Attorney General in charge of the Criminal Division of the Department of Justice (who appeared on the brief before the Court of Appeals) said:

> "Of course, the other very obvious alternative was when it was found out that one of these jurors had been approached and if it was considered necessary, that all of the members of the jury panel be interrogated by investigative agencies. It would have been a simple thing to discharge the panel for that purpose, because then they would be interviewed not as jurors, not as live jurors or prospective jurors but as former jurors, and they would be in the capacity of any other witness. There could not be any possible question at that time and in that fashion of their being influenced in any way in any future case by any interrogation by the Government Agents. That was all that was involved in these decisions.
>
> "SENATOR WELKER: To get down to good old garden variety country language, it is more or less gestapo methods, isn't it, to have a Government agency, the F. B. I. or any other investigating agency going out here and interrogating prospective jurors?
>
> "MR. OLNEY: I think it is. I think that is a fair description of it.
>
> "SENATOR WELKER: I feel that way based upon my little practice of law.
>
> "MR. OLNEY: I might say this: *that in my opinion, had that been done and those jurors permitted to sit*

in a case as we were led to believe they were because they were kept active, I think that it would be pretty difficult to sustain a conviction with that kind of thing in view of these decisions that I have referred to such as the Sinclair case and others that have come down since.

"The Courts have been emphatic in denouncing that kind of practice, and that is the thing that we were preventing." (Emphasis supplied)

In *Mattox vs. United States*, 146 U.S. 140, this Court said that a juryman may testify to any facts bearing upon the question of existence of any extraneous influence, although not as to how far that influence operated upon his mind. This Court also said:

"It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated.

* * * * *

Indeed, it was held in People v. Knapp, 42 Mich. 267, that the presence of an officer during the deliberations of the jury is such an irregular invasion of the right of trial by jury as to absolutely vitiate the verdict in all cases without regard to whether any improper influences were actually exerted over the jury or not."

The Colorado Supreme Court in *Perry vs. People*, 63 Colo. 60, 163 Pac. 844, spoke in a similar vein and quoted from *Mattox vs. United States, supra.* On pages 65 and 66 of 63 Colorado, we find:

"That is to say, if the purity of the verdict might

have been affected, it must be set aside; if it could not have been affected, it will be sustained. A verdict upon which doubt rests cannot be sustained.

This is the overwhelming weight of judicial opinion and it applies with equal force, to all cases of misconduct or irregularity, whether committed by the jury, by the baliff, or other person; and it can make no difference whether such conduct be voluntary or involuntary, if it may have affected the verdict of the jury.

Mr. Hayne in his work on New Trial, has deduced from the authorities, three controlling propositions in considering the subject under discussion. They are:

1. It is not necessary for the moving party to show that the irregularity complained of did in fact materially affect his substantial rights, or that it actually prevented a fair trial. It is sufficient for him to show an irregularity which might have prevented a fair trial.

2. The question in such case is whether the court can see that no injury was done. If it be doubtful from the record whether injury was done or not, the verdict must be set aside.

3. Where the irregularity is shown, it is presumed to have been injurious unless the court can see the contrary from the record. And as a general rule the statements of jurors as to whether they were influenced or not, by any circumstances, are entitled to very little consideration. Vol. I, Sections 26 and 68, Hayne on New Trial.

The rule of the United States Supreme Court was in Mattox v. United States, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. 50, stated by Chief Justice Fuller, to be:

'It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with, be tolerated.' "

In *Little vs. United States*, 73 Fed. (2d) 861, 866, (10th Cir.) we find the statement:

"We conclude that where the entire record affirmatively discloses that an error has not affected the substantial rights of an appellant, it will be disregarded. But where error occurs which, within the range of a reasonable possibility may have affected the verdict of a jury appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence its verdict. So to hold would, as a practical matter, take from a defendant his right to a fair trial."

In *Stone vs. United States*, 113 Fed. (2d) 70, (6th Cir.) the Court said (page 77):

"When charged with a public offense, the defendant and the government each depends upon the jury exclusively for a weighing of the facts and when these are once determined by a jury verdict, no other tribunal may re-examine them. Faith in the courts and in the jury system must be maintained and it is proper that on questions such as we have here the rule should be such as to support the faith of all litigants in our judicial system and, as part thereof, trial by jury. That faith can be sustained only by keeping our judicial proceedings free from the suspicion of wrong. *The question is, not whether any actual wrong resulted from the conversation of Calloway with the*

juror under the circumstances related, but whether it created a condition from which prejudice might arise or from which the general public would suspect that the jury might be influenced to reach a verdict on the ground of bias or prejudice.'' (Emphasis Added)

We respectfully submit that the quotation is expressive of our contention.

The question is not whether actual wrong resulted but was a situation created from which prejudice might arise or from which it might be suspected that the jury was influenced in arriving at verdict by reason of bias or prejudice or because of the form of intimidation resulting from the appearance of its members before the Grand Jury and because of questions directed to them by Treasury Agents.

We respectfully submit prejudice is evident in the instant cause under the Stipulation which admitted the facts theretofore alleged on information and belief by petitioner.

CONCLUSION

It is respectfully submitted that in view of the admitted facts herein, namely the questioning of the petit jury panel by the Grand Jury and by Treasury Agents, this petition for a Writ of Certiorari should be granted,

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5120—May Term, 1955.

Irving M. Rubenstein, also known as Irving M. Ruby, Appellant, vs. United States of America, Appellee.	Appeal from the District Court of the United States for the District of Colorado.

[September 1, 1955.]

Isaac Mellman (Gerald N. Mellman was with him on the brief) for Appellant.

Robert Swanson, Assistant United States Attorney, (Warren Olney, III, Assistant Attorney General, Robert S. Erdahl, Carl H. Imlay, Attorneys, Criminal Division, Department of Justice, and Donald E. Kelley, United States Attorney, were with him on the brief) for Appellee.

Before Bratton, and Murrah, Circuit Judges, and Wallace, District Judge.

Bratton, Circuit Judge.

The present appeal in this criminal case presents for review the action of the trial court in denying without a hearing a motion to vacate and set aside the judgment and sentence.

The indictment contained two counts. The first count charged an attempt to evade and defeat income taxes and the second charged aiding and assisting in the preparation and presentation of a false and fraudulent income tax

return. Appellant was found guilty on both counts and was sentenced to imprisonment and payment of a fine on each count. On appeal, the judgment was affirmed in respect to the charge contained in the first count but reversed in respect to that contained in the second count, 214 F. (2d) 667; and certiorari was denied, 348 U.S. 896. After remand, the trial court reduced the period of imprisonment under the first count, on condition that the fine be paid. The fine was paid; the sentence of imprisonment under the first count went into effect; and appellant was imprisoned for its service.

After being incarcerated for service of the sentence, appellant filed in the case a motion to vacate and set aside the judgment and sentence. It was alleged in the motion that prior to the commencement of the trial of the case another criminal case in the same court was tried; that in such other case a certain defendant named Smaldone and others were charged with violations of income tax statutes; that such charges were similar to the charges against appellant in this case; that certain information was presented to the authorities which indicated that persons on the jury in the case against Smaldone and others had been approached on behalf of some of the defendants in that case; that such information resulted in an investigation by the grand jury; that, without the knowledge of appellant or his attorneys but with knowledge on the part of the court and the United States Attorney, the members of the panel from which the jury in the case against appellant was selected were questioned by agents of the United States Treasury and were called before the grand jury and interrogated as to whether they had been approached by anyone in respect to their jury service; that such interviewing, questioning, and interrogating of members of the jury panel constitute a form of

intimidation on behalf of the United States; that of necessity it had some effect upon the deliberation and determination of the jury in this case; and that therefore appellant did not have a fair and just trial before a fair and impartial jury as guaranteed by the Fifth and Sixth Amendments. The prayer in pertinent part was that notice be served upon the United States Attorney; that appellant be granted a prompt hearing; that upon a finding that there had been a denial or infringement of the constitutional rights of appellant, the verdict and judgment entered thereon be vacated and set aside; and that appellant have such other and further relief as should seem meet and proper. The motion was denied without a hearing, and this appeal followed.

After the appeal had been perfected, the parties filed in the trial court a written stipulation. It was stipulated among other things that a criminal case against Eugene Smaldone came on for trial; that a mistrial was declared and the case set for a second trial about two months later; that in the meantime, a grand jury undertook an investigation of jury tampering in connection with the then pending Smaldone case; that as the result of the investigation, indictments were returned charging Eugene Smaldone, Clyde Smaldone, and others, with conspiracy and the substantive offenses of attempted bribery and obstruction of justice in approaching members of the petit jury panel; and that the facts relating to the charges as developed at the trial were more fully reflected in Calvaresi et al. v. United States, 216 F. (2d) 891, reversed on other grounds, 348 U.S. 961. It was further stipulated that in connection with the investigation of the charge of jury tampering in the Smaldone case, members of the jury panel from which the jury selected to try the instant case was subsequently drawn were questioned by agents of the In-

ternal Revenue Service as to whether they had been approached concerning their jury service; that eight of the jurors who served in this case were questioned as to whether anyone had contacted or talked with them regarding their jury service; that one was questioned as to whether anyone had contacted or talked to him regarding his jury service, or had recently offered him an unusually attractive financial deal; and that all replied in the negative. It was further stipulated that in addition to the questioning by the agents of the Internal Revenue Service, the entire panel of petit jurors were questioned by the grand jury; that each was asked whether he had been approached by anyone with respect to his activities as a juror, whether he had received any threats or promises, and whether he had received any information on the subject; that in each instance the answer was in the negative; that one juror was asked whether he knew one Lawson, an individual involved in the Smaldone case; that the juror said he did but had not visited with him or had any dealings with him; that another juror was asked whether he knew the Smaldones, to which he replied that he only knew them through eating at their restaurant; and that a third juror volunteered the information that she was related "in a vague roundabout way through marriage" to the Smaldones but did not know them or anything about them. And it was further stipulated that the stipulation should be transmitted to this court as part of the record on appeal. A copy of the transcript of the proceedings of the grand jury relating to such jurors was appended to the stipulation as an appendix and was incorporated therein by reference. The stipulation, together with the transcript, was transmitted to this court and is before us.

The motion stated in express language that it was filed pursuant to 28 U.S.C.A. §2255. That statute pro-

vides in substance that a prisoner in custody under sentence of a court claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose the sentence, or that the sentence is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct it. The plain Congressional purpose of the statute was to provide that the attack upon a judgment which previously might have been made in a proceeding in habeas corpus should be made by motion filed in the criminal case, unless for some reason the remedy by motion is inadequate or ineffective to test the legality of the detention. The statute does not enlarge the class of attacks which may be made upon a judgment of conviction in a criminal case. Instead, it provides in substance that the attack must be made by motion in the court in which the sentence was imposed rather than in some other court through resort to habeas corpus, unless the remedy by motion is inadequate. The form of the attack is direct, but the scope is limited to matters which may be raised by collateral attack. A proceeding under the statute is an independent and collateral inquiry into the validity of the conviction. United States v. Hayman, 342 U.S. 205; Taylor v. United States, 193 F. (2d) 411; Kreuter v. United States, 201 F. (2d) 33; Smith v. United States, 205 F. (2d) 768.

Appellant did not attack the judgment and sentence on the ground that it was imposed in violation of the Constitution or laws of the United States, or on the ground that the court lacked jurisdiction to impose it, or on the ground that it was otherwise subject to collateral attack. He challenged the judgment and sentence on the ground that he was not tried before a fair and impartial

jury as contemplated by law. And over a long period of time the accepted procedure for presenting a question of that kind has been by motion for new trial. United States v. Fries, 3 Dall. 515; Raub v. Carpenter, 187 U.S. 159; United States v. Mayer, 235 U.S. 55; Remmer v. United States, 347 U.S. 227, 348 U.S. 904; Lancaster v. United States, 39 F. (2d) 30; Albizu v. United States, 88 F. (2d) 138, certiorari denied, 301 U.S. 707.

Even though it was stated in the motion that it was filed under section 2255, supra, and even though the judgment and sentence was not open to collateral attack by motion under the statute on the ground that the trial was not before a fair and impartial jury, that was not fatal to the right asserted in the motion or to the relief which was sought. There is no controlling magic in the title, name, or description which a party litigant gives to his pleading. The substance rather than the name or denomination given to a pleading is the yardstick for determining its character and sufficiency. E. S. Parks Shellac Co. v. Jones, 265 Mass. 108, 163 N.E. 883; White v. Mitchell, 206 Okla. 151, 241 Pac. (2d) 407; Girtman v. Girtman, 191 Ga. 173, 11 S.E. (2d) 782; Parker v. Nixon, 184 Ark. 1085, 44 S.W. (2d) 1088. Since the pleading challenged the judgment and sentence on a ground which was properly open to determination on motion for new trial, the trial court should have treated it as a motion for new trial and we do treat it in that manner.

Treating the pleading as a motion for new trial on the ground of newly discovered evidence, its crucial substance was that the questioning of the jurors by the agents of the Treasury, and their interrogation by the grand jury, constituted intimidation on the part of the United States which of necessity had effect upon the deliberation and determination of the jury, and that therefore appellant did

not have a fair and just trial before a fair and impartial jury. It is an axiomatic principle firmly imbedded in the field of fundamental law that it is vital to the judicial system that a jury shall determine the case free from external causes which tend to disturb the full and untrammelled exercise of deliberate and unbiased judgment, and that no ground of suspicion that the administration of justice has been thwarted by deliberate interference with that function of the jury can be tolerated. Within the range of that general rule lies the interdiction upon a party litigant subjecting members of the jury to critical surveillance for the purpose of ascertaining their acts and conduct while serving on the jury. Sinclair v. United States, 279 U.S. 749. And the United States in its capacity as a party litigant has no more right or privilege than any other litigant in respect to subjecting members of a live jury panel to surveillance concerning their acts and conduct during the time they are serving on the jury or prior thereto.

In this instance, the purpose of interviewing, interrogating, and examining the members of the jury panel was not to ascertain the kind of persons they were or the quality of jury service they were rendering or would likely render during their tenure as members of the panel. No improper motive of that kind occasioned the contacts with the jurors. The purpose of the contacts with the jurors was to ascertain whether a criminal offense or criminal offenses had been committed by persons seeking to interfere or interfering with the due administration of justice in another case or in other cases in the same court, and whether indictments should be returned charging such offense or offenses. But the result of the contacts upon the jurors sitting in this case is the criterion to be applied in determining whether there was an impingement

upon the right of the appellant to be tried before a fair and impartial jury. Regardless of the purpose, if the interviewing and examining of the jurors sufficiently disturbed or reasonably tended to disturb the calm equilibrium of timorous members of the panel, or those with sensitive temperaments that they could not or did not exercise the same calm and informed judgment which they would have exercised except for such contacts, the right of appellant to be tried before a fair and impartial jury within the contemplation of law did suffer impingement. But appellant did not have an opportunity to establish by proof these essential allegations contained in the motion. And the denial of the motion without affording him such opportunity constituted error. Remmer v. United States, supra.

The order denying the motion for new trial is vacated; and the cause is remanded to the District Court with directions to hold a hearing to determine whether the incidents of which complaint is made did affect or reasonably tend to affect the full and free exercise of the calm and informed judgment of any member or members of the jury, and if it is found that such incidents actually had or reasonably tended to have such effects, to grant a new trial.

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370250—55

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 543

IRVING M. RUBENSTEIN, A/K/A IRVING M. RUBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 16–23) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 1955 (R. 10). The petition for a writ of certiorari was filed on November 28, 1955.[1] The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

[1] Although petitioner originally styled his motion as one to vacate sentence under 28 U. S. C. 2255, the Court of Appeals, properly we believe, held that the motion would not lie under this section but could be entertained as a motion

QUESTION PRESENTED

Petit jurors who sat on petitioner's case had been questioned by Internal Revenue Agents and a grand jury several days prior to trial as to possible approaches made to them in connection with another unrelated case, and had revealed no knowledge of any such approaches. A *voir dire* examination prior to trial disclosed no bias or prejudice among the jurors. Nevertheless, reviewing the denial without a hearing of petitioner's motion to vacate after his conviction had been affirmed and service of his sentence begun, the Court of Appeals granted petitioner's prayer that he be given a hearing in the District Court to afford him an opportunity to show that such questioning had improperly affected the jury. The question presented is whether that order should be reviewed by this Court in the present posture of the case.

RULE INVOLVED

Rule 33 of the Federal Rules of Criminal Procedure provides:

> The court may grant a new trial to a defendant if required in the interest of jus-

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for a new trial cognizable under Rule 33, F. R. Crim. P. (Pet. 19–21). Treating the proceeding as a motion for a new trial, the time for filing a petition for a writ of certiorari expired 30 days after the filing of the judgment of the Court of Appeals. Hence this petition would appear to be out of time. See Rule 22 (2), Revised Rules of the Supreme Court of the United States; *United States ex rel. Coy v. United States*, 316 U. S. 342.

tice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

STATEMENT

Petitioner seeks review of an order of the United States Court of Appeals for the Tenth Circuit entered on September 1, 1955, which vacated the District Court's order denying his motion for a new trial and, on petitioner's application, remanded the case to that court with directions to hold a supplemental hearing on the issue of possibly prejudicial influence on the jury which had convicted him. The history of the case leading up to this petition may be summarized as follows:

Following a trial by jury in the United States District Court for the District of Colorado, petitioner was convicted under the first count of an indictment charging a willful attempt to evade income taxes for the year 1946, and on October 30, 1953, was sentenced to imprisonment for three

years and to pay a fine of $10,000. His conviction was affirmed on appeal, *Rubenstein* v. *United States,* 214 F. 2d 667 (C. A. 10), and certiorari was denied by this Court on December 6, 1954, 348 U. S. 896. On January 20, 1955, District Judge Ritter reduced the sentence from three to two years, conditioned upon payment of the $10,000 fine on or before February 2, 1955 (R. 5). The fine was paid and service of the sentence begun on January 30, 1955.

On February 8, 1955, petitioner filed a motion to vacate and set aside the judgment pursuant to 28 U. S. C. 2255, alleging that prior to the commencement of his trial on September 29, 1953, and without his knowledge or the knowledge of defense counsel, the members of the panel from which the jury in his case had been selected had been "questioned by United States Treasury agents as to whether or not they had been approached by anyone with reference to their jury service in the United States District Court, and that they were subsequently called as witnesses and questioned by the grand jury as aforementioned"; that such investigation of the jury panel resulted from a "hung" jury in a prior trial "involving certain defendants named Smaldone and others"; and that the questioning "constituted a form of intimidation on behalf of the Government and its agents and would of necessity have some effect upon the determinations and deliberations by the jury in defendant's case, and that by reason

thereof defendant did not and could not have had a fair and just trial before a fair and impartial jury as guaranteed by Amendments V and VI to the United States Constitution" (R. 6–9).

A stipulation of the parties, filed in the District Court for transmittal to the Court of Appeals (designated Supplemental Transcript of Record), reveals the following facts:

On June 2, 1953, a criminal tax case against one Eugene Smaldone came on for trial in the District Court for the District of Colorado. A mistrial was declared on June 12, 1953, and the case was again set for trial on September 21, 1953. In the meantime, a grand jury undertook an investigation of jury tampering in connection with the prior and pending Smaldone tax cases, as a result of which indictments were returned in September and October 1953, charging Eugene Smaldone, Clyde Smaldone and others with conspiracy and the substantive offenses of attempted bribery and obstruction of justice in approaching members of the jury panel.[2]

On or about September 23 and 24, 1953, members of the jury panel from which the jury selected to try the instant case was subsequently drawn were questioned by agents of the Internal

[2] The facts as to these charges, as developed at the later trial of the indictments commencing on October 29, 1953, are set forth in *Calvaresi, et al.* v. *United States*, 216 F. 2d 891 (C. A. 10), reversed, 348 U. S. 961 (Supp. R. 2–3).

Revenue Service as to whether they had been approached concerning their jury service. Nine of the jurors who tried this case were so questioned before the trial. One of these, Mr. G. Vane Golden, was questioned on September 23, 1953, as to whether anyone had contacted or talked to him regarding his jury service or recently offered him an unusually attractive financial deal, to which questions he replied in the negative. The remaining eight were questioned as to whether anyone had contacted or talked to them regarding their jury service. All replied in the negative. (Supp. R. 3.)

In addition to the questioning by the agents, the entire panel of petit jurors was questioned by the grand jury. The twelve jurors who tried petitioner's case were very briefly questioned on September 24 and 25, 1953. A copy of the transcript of the grand jury proceedings relating to these jurors is appended to the stipulation of the parties (Supp. R. 5–22). Each was asked whether he had been approached by anyone with reference to his activities as a juror, whether he had received any threats or promises, and whether he had received any information concerning such approaches or threats. In each case the answer was in the negative. In addition, Juror G. Vane Golden was asked whether he knew one Lawson (an individual involved in the Smaldone case). He said that he did but that he had not visited or had dealings with him. Juror

Daniel E. Perry was asked whether he knew the Smaldones. He replied that he knew of them only through eating in their restaurant. Juror Rea F. Fuerstock volunteered the information that she was related "in a vague round-about way through marriage" with the Smaldones but did not know them or anything about them (Supp. R. 3–4).

The questioning of each juror was short, occupying only a page or two of the transcript. None of the jurors who tried petitioner's case was actually connected in any way with the Smaldone case, and none had knowledge of any alleged improper approach to other jurors. No reference of any sort was made to petitioner's case or to any other case which intervened between the questioning and petitioner's case.[3]

Petitioner's case came on for trial on September 29, 1953. The transcript of the *voir dire* examination of the jurors (R. 11–24) indicates that the court first informed the array of the nature of the case, and then questioned them as to their occupations, any difficulty they had had with the Internal Revenue Service, and any possible bias from the nature of the case. Following the gen-

[3] The jury panel had served for other cases which intervened between the interrogation and the commencement of the trial of the instant case. Two such cases were *United States* v. *Cora Janette McRae*, Crim. No. 13604, and *United States* v. *Robert Joseph Moss*, Crim. No. 13671, both marihuana cases. Six jurors who sat in the instant case were members of the jury in the above trials.

eral questioning, each juror was individually questioned by the court to detect any bias or prejudice. Petitioner's counsel exercised his right to ten challenges. Following the individual examination, the court again asked the jury if there was anything about the case which would create bias or prejudice in their minds, or if any of them had ever had any personal difficulty with the Internal Revenue Service. Some of the jurors had had their income tax returns audited but none had experienced any difficulty of any kind. After all challenges had been made, one of the last admonitions the completed jury heard before taking the oath was in pertinent part as follows (R. 23):

> The COURT: Now, ladies and gentlemen of the jury, when you take the oath to serve as a juror in this case it will be your obligation to try the issues between the United States and the defendant fairly and impartially without any bias or prejudice, passion or sympathy of any nature at all.
>
> Now, I want to ask you ladies and gentlemen if there is any matter of any character or nature that anyone has in mind—and I am addressing this to each one of you individually, which you think might prejudice you from trying the issues fairly and impartially between the United States and this defendant? If there is any matter in the mind of any of you, or if there is any matter that you think might embarrass you to act as a juror, it is your duty now to inform the Court about that matter.

The case then proceeded to trial on September 29, 1953, and on October 2, 1953, a verdict of guilty was returned.

On February 23, 1955, District Judge Ritter denied petitioner's motion to vacate without a hearing (R. 9–10). On appeal, petitioner urged as error the refusal to grant him a hearing, and prayed that one be granted (Pet. 18). The Government opposed this, arguing that although the record, including the stipulation of the parties, showed that the jurors had been very briefly questioned by Internal Revenue agents and a grand jury several days prior to this and other intervening trials concerning their possible knowledge of approaches made to them in connection with an unrelated case, there had been a *voir dire* examination prior to this trial to detect any possible attitude of bias, and that none had been detected. The Government contended that a hearing was unnecessary in the absence of a showing by petitioner that the *voir dire* was less than an accurate canvas of the attitudes of the jurors.

On September 1, 1955, the Court of Appeals, largely on the authority of *Remmer* v. *United States,* 347 U. S. 227, vacated the order of the District Court. Treating petitioner's motion as one for a new trial on the ground of newly discovered evidence,[4] it remanded the case with di-

[4] Petitioner's motion did not raise issues going to the jurisdiction of the District Court, and therefore did not raise

rections to the District Court to hold a hearing to determine whether the incidents complained of affected, or reasonably tended to affect, the full and free exercise of the calm and informed judgment of any member or members of the jury, and if it should find that such incidents actually had or reasonably tended to have such effect, to grant a new trial (Pet. 16–23).

ARGUMENT

Petitioner argues that the Court of Appeals erred in ordering a hearing in the District Court on the question whether any of the jurors who judged his tax evasion case were prejudicially affected in that trial because they were questioned before trial as to possible tampering in another, unrelated case. He urges that the Court of Appeals should have held on the stipulated facts alone, without a hearing, that he was entitled to have his conviction set aside and a new trial ordered. The argument, particularly in the present posture of these proceedings, presents no basis for certiorari.

In the first place, the case is not ripe for review. The Court of Appeals has not finally determined whether petitioner is entitled to a new trial. All it has done, responsive to petitioner's request, is to decide that the District Court erred in refusing

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issues cognizable on collateral attack. See *United States* v. *Mayer*, 235 U. S. 55, 69. The Government conceded, however, that the motion could be deemed one for a new trial. See fn. 1, *supra*, pp. 1–2.

to hear the merits of his claim and exercise its discretion after receiving evidence to show whether as a matter of fact the jury was improperly affected by the inquiries in question. And, as this Court has held, the question whether a new trial should be granted is for the determination of the trial judge in the first instance rather than the appellate tribunal. *United States* v. *Johnson,* 327 U. S. 106, 113; *Cone* v. *West Virginia Paper Co.,* 330 U. S. 212, 216–217. After petitioner is accorded the hearing he sought, he can, on the basis of the facts there developed, reassert any issues of law which remain in the case at that time. He is free then to present in the trial court his contention that the burden of proof should be upon the Government in this case to show absence of prejudicial influence on the jury.

It seems clear, in any event, that the facts now known do not require, as a matter of law, the grant of a new trial. The questioning of the jurors had no relevance to their duties in the instant case and was on its face unlikely to have influenced their decision. The questions were routine and, except for some specific references to the Smaldone case, colorless. (See Supp. R. 5–22.) At no time was the instant case mentioned or otherwise adverted to in name or substance. There was no statement made which could be construed as a suggestion or insinuation that any juror should do less than his duty in this or

any other case on which he might sit. When this case came on for trial the careful questioning by the trial judge of the jurors as a group and individually failed to elicit any trace of bias or prejudice toward the petitioner or the case. Petitioner cites no fact which tends to show that actual prejudice resulted.

Even in those cases, unlike this one, where an unauthorized contact "with a juror during a trial about the matter pending before the jury" is established, the mere fact of contact does not *ipso facto* require a new trial. There is only a rebuttable presumption of bias which shifts the burden to the Government, to show, on a hearing in the District Court, that no actual bias resulted. *Remmer* v. *United States,* 347 U. S. 227, 229; *Mattox* v. *United States,* 146 U. S. 140, 148–150. This Court in *Remmer* did not hold that the mere fact of contact required a new trial; it remanded the matter for hearing.[5] Here, even though there was no unauthorized contact with a juror "about the matter pending before the jury", and therefore

[5] While the *Remmer* case is again pending before this Court on writ of certiorari to the Court of Appeals for the Ninth Circuit (No. 156, this Term), the issue whether the particular evidence adduced in the supplemental hearing in that case was sufficient to overcome the presumption of prejudice arising from the extraneous jury contact during the trial about the very subject matter of the trial would seem to have no bearing on this case, at least in the present posture of this case.

no presumptive showing of bias, as in *Remmer,* the Court of Appeals followed this Court's precedent in remanding the case in order that the District Court might reexamine the issue on the basis of a complete record. Until the District Court has had an opportunity to pass on the issue and dispose of the motion by final order, no intermediate review by this Court would seem to be justified.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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